Minutes
CIVIL COMMISSION
225 Spring Street, Fourth Floor, Room 4B
Wethersfield, CT
Monday, March 14, 2016
2:00 pm.

Those in attendance: Hon. Patrick L. Carroll III; Hon. Elliot N. Solomon; Hon. William H. Bright, Jr. (chair); Hon. James W. Abrams; Hon. Barbara N. Bellis; Hon. Marshall K. Berger, Jr.; Hon. Aaron Ment; Hon. Cesar A. Noble; Hon. Mark H. Taylor; Atty. Agnes Cahill; Atty. William H. Clendenen, Jr.; Atty. Michael J. Dorney; Atty. Victoria Metaxas; Atty. Ralph J. Monaco; Atty. Catherine Smith Nietzel; Atty. Jonathan B. Orleans; Atty. Rosemarie Paine; Atty. Louis R. Pepe; Atty. Agostinho J. Ribeiro; Atty. Richard A. Roberts; Atty. Richard A. Silver; Atty. Paul A. Slager; Atty. William J. Sweeney; Atty. William P. Yelenak; and Atty. Angelo A. Ziotas.

I. Welcome – The meeting was called to order by Judge Bright at 2:05 p.m.

II. Approval of Minutes – Upon motion by Judge Abrams and second by Atty. Paine, the minutes from the meeting of December 7, 2015 were unanimously approved.

III. Discovery Subcommittee Report – Atty. Yelenak reported on the work of the subcommittee. Most of the items being presented today were already given to the commission. The subcommittee has attempted to address the comments and concerns of the commission. The first item was an inquiry from the Rules Committee regarding the proposed revisions to the standard discovery regarding recordings, specifically to Forms 201, 202, 203, 204, 205 and 206 (standard interrogatories and production requests). The Rules Committee asked if Section 13-3(c) of the Practice Book should be revised. The subcommittee agreed that additional language should be added to that section to make clear that the rule applies only to a recording prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative would. Brief discussion ensued.

Upon motion made by Judge Bellis and seconded by Atty. Ziogas, the commission unanimously approved the additional language in Sec. 13-3(c) and the additions to the standard discovery forms.

The next item is the cell phone discovery, which has also been before the commission. The subcommittee has simplified the request by asking only about the use of a cell phone for any activity that caused the person to look at the cell phone, changing the time frame from "ten minutes" to "immediately prior to the incident"; and eliminating any production request for cell phone records. These are standard interrogatories, and a party can follow up on the questions at a deposition, or seek permission to file a request for production of cell phone records. After discussion, including the risks of choosing a specific time, whether the qualifier "caused you to look at your cell phone" was necessary; and whether the language about the police report should remain in the interrogatory. After discussion, the language about the "time as indicated in the police report" was removed. Atty. Roberts proposed a friendly amendment that would add a time frame of "within two minutes immediately prior to the incident" and eliminate "caused you to look at your cell phone." After brief discussion, the proposal to amend Forms 201 and 202 was amended further to read as follows:

If you were the operator of any motor vehicle involved in the incident that is the subject of this action please state whether you were using a cell phone for any activity, including but not limited to calling, texting, emailing, posting, tweeting, or visiting sites on the web for any purpose, at or immediately prior to the time of the incident.

Upon motion by Judge Abrams, and second by Judge Berger, the commission unanimously voted to approve the amended cell phone interrogatories.

The next item was the interrogatories on loss of consortium. The subcommittee sought to address the concerns expressed by the commission about the interrogatories, specifically question number 16, which asked about counseling. The concerns were that the question was too broad in defining counseling and too long in terms of time. The subcommittee is now proposing that the counseling be limited to "marriage counseling" and the time be limited to "within two years prior to the year of the incident." The other concern of the commission was the confidentiality of counseling records, and the complexities of confidentiality based upon the provided of the counseling. The subcommittee is suggesting that no production request be included as part of standard discovery. These records can be sought through the filing of a motion for permission to file non-standard discovery. Discussion ensued, including the likelihood that a defendant would routinely want these types of records when there is a consortium claim, whether the period covered should include the time not only before the incident but up to the present, whether psychological/psychiatric records are currently excluded from the standard interrogatories, and the statutory restrictions associated with disclosing marriage counseling records.

The discussion then shifted to a somewhat related proposal of the subcommittee which is to make it clear in Section 13-6 and 13-9 that the fact that standard discovery is used in a case is not a reason to decline to permit additional discovery when necessary. Atty. Yelenak pointed out the language the subcommittee is proposing to add as a new subsection (c) in 13-6 and subsection (b) in 13-9. Judge Bellis suggested including "for permission" after the word "moving" to make it clear that a party had to seek permission.

Discussion then returned to the question of a production request for records regarding marriage counseling, including the reality that even without standard production, parties would work something out because they are aware that the court would order production of such records in a loss of consortium case, the difficulty in framing the production request in light of the various confidentiality statutes, and the potential need for production requests for payment records or other documents in these loss of consortium cases. In light of the discussion, Judge Bright proposed that the subcommittee go back and consider the production requests again, and discuss including any other records that might be needed, and perhaps a limitation along the lines proposed by Atty. Orleans, subjecting the production to such confidentiality rules as are part of Connecticut law. The subcommittee agreed to do so.

Judge Bright asked if the group was okay with the proposed limit of two years prior to the incident up to the present." Atty. Monaco asked about putting an exception of some kind in for wrongful death cases, wherein questions number 13, 14 and 15 would not be appropriate. After discussion, no change will be made.

Judge Bright then read question number 16 as amended after the discussion:

Within two years prior to the year of the incident and up to the present, have you and/or your spouse had any marriage counseling? If so, state the name of each person consulted and the dates consulted or treated.

Upon motion by Judge Ment and second by Atty. Sweeney, the commission unanimously approved the loss of consortium interrogatories as amended.

Atty. Yelenak then returned to the proposal to amend subsection (c) of 13-6 and subsection (b) of 13-9. Judge Noble said he viewed this as a two-step process: first, seeking permission to file non-standard interrogatories and second, obtaining the information. Discussion ensued, including adding "for permission" after "moving, changing the word "obtain", and removing the language "in which their use is mandated" from the proposal. The proposal now reads:

- The standard interrogatories are intended to address discovery needs in most cases in which their use is mandated, but they do not preclude any party from moving for permission to serve such additional discovery as may be necessary in any particular case.

- The standard requests for production are intended to address discovery needs in most cases in which their use is mandated, but they do not preclude any party from moving for permission to serve such additional discovery as may be necessary in any particular case.

Upon motion by Judge Noble and second by Judge Berger, the commission voted unanimously to approve the proposed amendments to Sec. 13-6 and 13-9.

Atty. Yelenak then talked briefly about the proposed standard interrogatories in uninsured motorist cases. He asked the commission members to look over the proposals and plan on discussing them at the next meeting of the commission. The standard discovery for these cases is necessary as some judges and attorneys believe that the standard discovery is applicable, even though these are more in the nature of contract cases. The proposed standard interrogatories incorporated the damages interrogatories, but also have some specifics about policy information, coverage, and disclaimers.

He also discussed two other areas the subcommittee had been asked to consider: standard medical malpractice discovery and standard employment discovery. Although some discovery material was given through the Committee on Discovery and Expedited Litigation on medical malpractice matters by Atty. John J. Kennedy, Jr. and Expedited Litigation, and on employment cases from Atty. Elizabeth J. Stewart, Atty. Yelenak said that the subcommittee wanted some additional volunteers who had more experience in these two areas, including but not limited to members of the commission. Atty. Ziogas and Atty. Cahill volunteered to work with the subcommittee on the medical malpractice interrogatories. Several suggestions of other attorneys were made, and members of the commission will contact those attorneys to determine if they would be interested in participating, and send their names to Judge Bright.

Atty. Yelenak then mentioned the subject of automatic disclosures. Before the subcommittee got too involved in developing automatic disclosures, they wanted some input from the commission members. Atty. Yelenak suggested that one option would be to simply have the standard discovery be mandated so that it is unnecessary to serve it on other parties. Discussion ensued about the time frames for automatic disclosures, and the possibility of requiring a plaintiff to provide, for example, all medical bills that he or she had in order to permit an earlier review of the case by a carrier. The subcommittee will look at establishing time frames and perhaps staging discovery. Atty. Ribeiro talked about the burden on the small practitioner who may be just filing suit in a lower value case simply to protect the statute of limitations, although the matter is close to settling. Perhaps the rule could provide some flexibility in terms of lower value cases by including language such as “unless otherwise agreed upon by the parties” or “unless otherwise authorized by the judicial authority.” Lengthy discussion ensued, including what impact this type of rule would have on cases in which no discovery would normally be filed, the possibility of an increase in the motions for extensions of time, and that such rules exist in other states, such as New Jersey.

The subcommittee will consider the development of a rule on automatic disclosures and talk about reasonable time frames for such disclosures.

IV. Workgroup on Civil Rules and Statutes – Judge Berger first talked about the revised rule that the workgroup was proposing on pro hac vice appearances. The proposal would expand the rule to include “any state court proceeding, any proceeding before an arbitrator, mediator, and any municipal or state agency, commission, board or tribunal. According to the Supreme Court decision, it is not up to administrative agencies to make this ruling; it is the Branch’s obligation. If you have a proceeding that is not before a court, a motion would be filed within the JD where that proceeding is being held.

Discussion ensued, including how this process would work if there were no case pending, whether arbitration and mediation should be included and the impact of such a rule on reciprocity with other states (approximately 40 states provide such reciprocal permission to Connecticut attorneys currently); the expense of having a Connecticut attorney present for an arbitration or mediation; the inconsistency of a rule this broad with the general trend toward the practice of law becoming national; the advantage of having a clear rule

about arbitration and mediation; and what the current Rules of Professional Conduct and their requirement that out-of-state counsel notify statewide bar counsel (Rule 5.5 (f)) and pay the client security fund fee.

After lengthy discussion, Judge Ment moved that arbitration and mediation be stricken from the proposal. Judge Abrams seconded the motion. The commission agreed unanimously to strike arbitration and mediation from the proposal.

The commission then discussed having Legal Services look at the Rules of Professional Conduct, and Judge Bright will work with Atty. DelCiampo on this issue.

Discussion continued, including the inherent power of a judge to excuse local counsel from attendance at proceedings and notice requirements. Judge Taylor asked whether there would be notice to all parties, and Judge Berger said that anyone who was a party within the agency proceeding would receive notice. This would be included in the form prescribed by the chief court administrator.

Atty. Clendenen moved that the proposed revision to Sec. 2-16 without the reference to arbitration and mediation be approved. The motion was seconded by Atty. Ziogas. Judge Bright voted against the proposal, but all others present at the meeting voted in favor of it, and the motion was approved.

Judge Berger then discussed the proposals that had been referred by the Rules Committee on amending pleadings, or other parts of the record or proceedings, and amending the amount in demand. The workgroup revised the language of 10-60 slightly to make it easier to follow, and recommended that no separate document showing deletions/additions be required when amending the amount in demand. They did suggest deleting portions of the existing rule as they are no longer necessary.

Upon motion by Atty. Monaco and second by Atty. Clendenen, the commission voted unanimously to approve the revised sections.

Judge Berger then told the commission that the Rules Committee had returned the proposal to eliminate the Demand for Disclosure of Defense. There was concern that the elimination of the rule would have a negative impact on foreclosure cases. Some concern was expressed by Judge Abrams, and Judge Bright reported that Judge Mintz also expressed concern, but also said that people would adjust to the removal of the rule, if necessary. Judge Berger pointed out that the rule only applied if an attorney had filed an appearance, implying that the answer filed by the attorney was not sufficient indication that there was a good faith basis for filing the answer. The question of what was wrong with requiring the plaintiff to prove his or her case was also raised as was the possibility of carving out an exception for foreclosures. After the discussion, the commission agreed to send back to the Rules Committee the proposal to eliminate Section 13-19 – Demand for Disclosure of Defense, with Judge Taylor, Judge Abrams, and Atty. Yelenak voting against sending the proposal back to the Rules Committee.

V. New Business – Judge Bright reported that the prescreening report was sent to all the judges together with a cover email as discussed at the last Civil Commission meeting. It will also be sent out to the bar in the coming weeks. He briefly mentioned the CLE proposal and a new rule on the expanded use of video-conferencing in the courts, both of which will be going to public hearing in May.

Atty. Silver suggested that the agenda and materials be provided to the commission at least a week in advance.

- Next Meeting – Judge Bright provided the Commission with the upcoming meeting dates which will continue to be held in Wethersfield at 2:00 p.m. The dates are: June 13, 2016, September 12, 2016, and December 12, 2016.

Upon motion and second, the meeting adjourned at 4:00 p.m.